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# State v. Ward Appellant's Brief Dckt. 40069

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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

**COPY**

STATE OF IDAHO,

Plaintiff-Appellant,

vs.

KORI LYNN WARD,

Defendant-Respondent.

NO. 40069

Twin Falls Co. Case No.  
CR-2011-10866

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**BRIEF OF APPELLANT**

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**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF TWIN FALLS**

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**HONORABLE G. RICHARD BEVAN  
District Judge**

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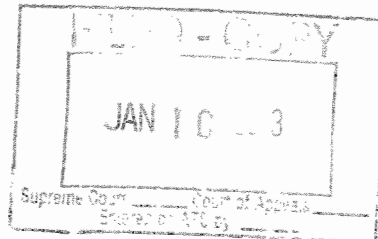
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## STATEMENT OF THE CASE

### Nature Of The Case

The state appeals from the district court's order granting Kori Lynn Ward's suppression motion.

### Statement Of The Facts And Course Of The Proceedings

The state charged Ward with possession of methamphetamine. (R., pp. 46-48.) Ward moved to suppress evidence obtained as a result of an entrance into her residence. (R., pp. 74-82.) The district court found that officers went to Ward's residence in response to a report that Ward had attempted to kill herself by slitting her wrists. (R., p. 116.) They saw a spent shotgun shell in her front yard as they approached her house. (Id.) They made contact with Ward at her front door, and she appeared "emotionally upset" and "her mannerisms were erratic." (Id.) The officers asked Ward to turn down the music playing in her residence so they could communicate. (Id.) Ward agreed and went back into her residence, but once there Ward pressed a button on the stereo that neither stopped the music nor decreased the volume and then started walking down a hallway. (R., pp. 116-17.) The officers called after Ward, but she did not return. (R., p. 117.)

Fearing that she would harm herself, officers entered and "escorted her back to the living room area." (Id.) "Ward's movements continued to be erratic and she seemed intoxicated." (Id.) She "kept mumbling" in an "incoherent" manner about "unrecognizable topics," but officers were able to discern statements that "nobody cared about her, that she was alone, and that she did

not want to be here anymore.” (Id.) Officers observed “several scratches” on Ward’s wrists and “deeper cuts up her forearm that were still bleeding,” although the injuries did not appear life-threatening. (Id.) Her state of extreme intoxication also caused the officer concern that she “may have ingested medication in an attempt to commit suicide.” (R., pp. 117-18.)

Officers asked Ward if she had firearms in the house, to which she responded affirmatively and indicated a shotgun in a corner of the room where she and the officers were located. (R., p. 118.) When reaching for the shotgun, an officer saw “an open box where a glass pipe and what appeared to be methamphetamine were visible.” (R., p. 118.)

Paramedics arrived shortly thereafter, treated Ward’s injuries, and left. (Id.) The officers then took Ward “into protective custody and transported her to the hospital for evaluation,” which evaluation “ultimately resulted in Ward being placed on a mental hold.” (Id.)

The district court concluded that the circumstances that might have justified entry into the home were “police-created” and therefore not properly considered as exigent circumstances. (R., pp. 118-21.) Specifically, officers created the need to enter her residence by asking Ward to turn down her stereo instead of immediately checking her wrists. (R., pp. 122-25.) Even if the entrance was proper, the court concluded, the “search for the gun was beyond the scope of the exigent circumstances” because officers could have kept Ward from accessing the gun without taking it into their possession. (R., pp. 125-26.)

The state filed a timely appeal. (R., pp. 136-38.)

### ISSUE

The district court applied an exigent circumstances analysis at odds with precedent of the Supreme Court of the United States. Does application of the correct legal analysis show that the district court erred by finding a Fourth Amendment violation?

## ARGUMENT

### The District Court Erred By Concluding That, Because Alternate Courses Of Action Were Available, The Need To Assure Ward's Health And Safety Was A "Police Created Exigency"

#### A. Introduction

In ruling on the motion, the district court relied heavily on State v. Kelly, 131 Idaho 774, 776, 963 P.2d 1211, 1213 (Ct. App. 1998), for the proposition that a "police-created exigency" would not justify entry into a house, and that an exigency was "police-created" if the police had alternative courses of action. (R., p. 120.) Applying this law the court concluded that "the exigent circumstances being relied upon to justify the entry are entirely police-created and that creation was avoidable by at least one reasonable alternative." (R., p. 122.) The court then reasoned that, because it was the police that directed Ward into her home to turn down her stereo, the police created the exigency of having to go in after her when she did not return. (R., pp. 122-25.) The court held in the alternative that even if the entry into the home was not improper the officers conducted an unreasonable search for the shotgun. (R., pp. 125-27.)

The district court erred for two reasons. First, the "police-created exigency" doctrine has been explicitly rejected by the Supreme Court of the United States. Thus, the district court applied an incorrect legal standard. Second, it was objectively reasonable to secure the shotgun under the circumstances.



B. Standard Of Review

The standard of review of a suppression motion based on an asserted Fourth Amendment violation is bifurcated. When a decision on a motion to suppress is challenged, the appellate court accepts the trial court's findings of fact that are supported by substantial evidence, but freely reviews the application of constitutional principles to those facts. State v. Klingler, 143 Idaho 494, 496, 148 P.3d 1240, 1242 (2006); State v. Tyler, 153 Idaho 623, \_\_\_, 288 P.3d 840, 843 (Ct. App. 2012).

C. The District Court's Application Of The Repudiated "Police-Created Exigency" Doctrine Was Reversible Error

In Kelly a police responded to a call about an arson. 131 Idaho at 775, 963 P.2d at 1212. When the officer arrived he saw a still-smoldering shed and a can of gas that was on fire. He followed footprints in the snow to Kelly's residence. He saw Kelly inside dressed in a coat and hat. When the officer knocked on the door Kelly retreated, but his wife answered the door. When the wife turned from the door and walked into the house the officer followed. Id.

The district court upheld the entry on the basis of exigent circumstances. Id. The appellate court, however, rejected the argument that potential loss of evidence or escape of the suspect created exigent circumstances "because any exigency that arose here was of [the officer's] own making." Id. at 776, 963 P.2d at 1213. Because there was no "threat of immediate destruction of evidence or flight" until the officer's presence was known, the officer should have "retreated undetected" and then "obtained a search warrant without fear that the suspect

would be prompted to flee or to destroy valuable evidence.” Id. The Court of Appeals based its analysis on the rules by other courts that “have held that a warrantless entry will not be justified by a police-created exigency, at least where the police conduct was unnecessary in view of available alternatives.” Id.

Applying the holding of Kelly, the district court held that because the police played a role, however inadvertent, in Ward’s retreat back into her house instead of keeping her at the front door, the police created the exigency requiring entrance into the house when a different course of action, investigating whether Ward was a danger to herself or others at the front door, would not have required any entry into the house. (R., pp. 122-25.) Thus, the district court took the police-created exigency doctrine of Kelly, in which officers forfeit any exigency their presence might create when they approach a home instead of seeking a warrant, and expanded it into second-guessing every aspect of a police investigation. This expansion would have been unwarranted in its own right; however, the district court erred primarily because the police-created exigency doctrine applied in Kelly has been specifically repudiated by the Supreme Court of the United States.

In Kentucky v. King, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1849 (2011), officers, after a controlled drug buy in a breezeway of an apartment building, knocked on the door of the apartment where they suspected the crack cocaine dealer was and announced their presence. They heard sounds they suspected were a prelude to the destruction of evidence. Based on this exigency they entered the apartment, and saw marijuana and cocaine in plain view. A subsequent search revealed

additional evidence. Id. at 1854. The apartment entered was actually next door to the dealer from whom the controlled buy was done. Id. at 1854-55.

The Supreme Court of Kentucky reversed the denial of suppression, concluding that if there was either bad faith by the police in creating the exigency or if the exigency was a reasonably foreseeable result of police action, the police acted unreasonably under the constitution.<sup>1</sup> Id. at 1855. The Supreme Court, however, rejected any existing police-created exigency doctrine and held that unless the police created an exigency “by engaging or threatening to engage in conduct that violates the Fourth Amendment” there would be no grounds for suppression. Id. at 1858.

After announcing the rule, the Court discussed, and rejected, all of the extant “police-created exigency” standards and their justifications employed by lower courts. The Court concluded a “bad faith” standard was “fundamentally inconsistent” with the Court’s rejection of any subjective approach with the Fourth Amendment. Id. at 1859. The “reasonable foreseeability” test was inconsistent with the Court’s jurisprudence rejecting “the notion that police may seize evidence without a warrant only when they come across the evidence by happenstance.” Id. at 1859-60. The Court rejected the “probable cause and time to secure a warrant” standard, probably the most similar to the reasoning of Kelly, because it “unjustifiably interferes with legitimate law enforcement strategies” and is inconsistent with the recognition that there are “many entirely

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<sup>1</sup> The district court in this case went even further than the Supreme Court of Kentucky in King because it was not reasonably foreseeable that asking Ward to turn down the music would create exigent circumstances.

proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired.” Id. at 1860. “We have said that law enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause.” Id. at 1860-61 (internal quote and brackets omitted). Finally, the Court rejected the “standard or good investigative tactics” approach, the standard most like that applied by the district court in this case, because it “fails to provide clear guidance for law enforcement officers and authorizes courts to make judgments on matters that are the province of those who are responsible for ... state law enforcement agencies.” Id. at 1861.

The Court then reiterated its holding: “we conclude that the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment.” Id. at 1862. It concluded that, under this test, the officers in that case did not gain entry by an actual or threatened Fourth Amendment violation. Id. at 1862-64.

In this case the district court concluded that the officer’s “order to go further into the house and away from the deputies’ immediate area” created the need for the officers to go into the house to re-gain control over Ward, and therefore the exigency was “police-created.” (R., pp. 123-24.) However, directing Ward to turn down her stereo to facilitate verbal communication, as was done here, is not “an actual or threatened violation of the Fourth Amendment.” King, 131 S.Ct. at 1862. Thus, there were no grounds for suppression.

The district court did not apply the standard articulated by the Supreme Court.<sup>2</sup> Application of the standard as articulated by the Supreme Court of the United States shows there was no Fourth Amendment violation. Ward's decision to not turn down the stereo and return as instructed, but instead to move into the house, in turn creating the exigency for the police to enter to prevent her from harming herself, was not the result of unconstitutional conduct by the officers. The district court's order of suppression on the basis of "police-created exigency" must therefore be reversed.

D. The District Court's Conclusion That Securing The Shotgun Was Constitutionally Unreasonable Was Also Error

The district court concluded that the officers engaged in an inappropriate "search for the gun" because such search was "beyond the scope of the exigent circumstances" and analogized the officer's actions to an inappropriate Terry frisk. (R., pp. 125-27.) The flaw in the court's reasoning is that the facts show there was no search for the gun, which was in plain view. Observation of items in plain view is not a search. Katz v. United States, 389 U.S. 347, 351 (1967); State v. Wright, 153 Idaho 478, \_\_\_, 283 P.3d 795, 806 (Ct. App. 2012); State v. Linenburger, 151 Idaho 680, 684, 263 P.3d 145, 149 (Ct. App. 2011). The

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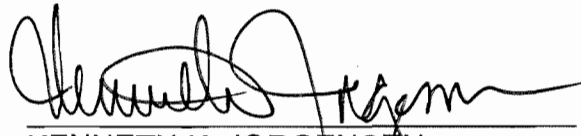
<sup>2</sup> The district court's analysis that by instructing Ward to turn down the stereo officers demonstrated they did not subjectively believe there was an exigency (R., pp. 122-23) is also directly contrary to well-established law that the Fourth Amendment employs an objective analysis. King, 131 S.Ct. at 1859 ("Our cases have repeatedly rejected a subjective approach" (internal quotations omitted)). Whether the officers subjectively believed there was an exigency is irrelevant under the proper legal standard of whether there was objectively an exigency justifying the intrusion.

district court found that, after Ward indicated there was a firearm in the corner, an officer "saw the shotgun in the corner." (R., p. 118.) When he moved to retrieve the weapon he saw the contraband in question. (Id.; see also Tr., p. 39, L. 8 – p. 40, L. 23.) Because the district court's findings show there was no search for the shotgun because it was in plain view, the district court erred by finding an illegal search.

#### CONCLUSION

The state respectfully requests this Court to reverse the district court's order granting the suppression motion.

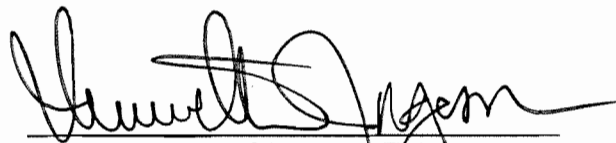
DATED this 10th day of January, 2013.

  
KENNETH K. JORGENSEN  
Deputy Attorney General

#### CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of January, 2013, I caused two true and correct copies of the foregoing BRIEF OF APPELLANT to be placed in the United States mail, postage prepaid, addressed to:

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KENNETH K. JORGENSEN  
Deputy Attorney General

KKJ/pm